

**PLACER COUNTY SUPERIOR COURT
CIVIL LAW AND MOTION TENTATIVE RULINGS
FRIDAY, NOVEMBER 6, 2020**

These are the tentative rulings for civil law and motion matters set at **8:30 a.m. on Friday, November 6, 2020**. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by **4:00 p.m., Thursday, November 5, 2020**. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

Except as otherwise noted, these tentative rulings are issued by the **HONORABLE MICHAEL W. JONES** and if oral argument is requested, it will be heard in Department 3, located at 101 Maple Street, Auburn, California.

PLEASE NOTE: TELEPHONIC APPEARANCE IS STRONGLY ENCOURAGED FOR ALL CIVIL LAW AND MOTION MATTERS. (Emergency Local Rule 10.28; see also Local Rule 20.8.) More information is available at the court's website: www.placer.courts.ca.gov.

1. S-CV-0038653 Hill, Michelle Lynn vs. Lecona, Raul, et al

The motion for summary adjudication is continued to December 4, 2020, at 8:30 a.m. in Department 3.

2. S-CV-0040007 Rice, Jerrold R. vs. Kishiyama, James S., et al

This tentative ruling is issued by Commissioner Michael A. Jacques:

On November 2, 2020, plaintiff filed a request for permission to file a late opposition. The court grants plaintiff's request as set forth in the declaration of Gerald Langle. **The motion is continued to December 4, 2020, at 8:15 a.m. in Department 1.**

Plaintiff may file and serve his opposition to the motion on or before November 16, 2020. Defendant may file and serve any reply to the opposition on or before November 23, 2020.

3. S-CV-0041985 State Farm General Ins. Co. vs. Bangert, James Edward, et al

The demurrer to second amended complaint is continued to December 4, 2020, at 8:30 a.m. in Department 3.

4. S-CV-0042013 Morales, Allison vs. Van Duker, Cynthia

Motion to be Relieved as Counsel (Allison Morales)

The motion to be relieved as counsel for plaintiff Allison Morales by Jamil L. White, Esq. and Louis White PC is granted, effective upon the filing of proof of service of the signed order after hearing on the client, Allison Morales. Counsel is directed to lodge an amended proposed order with the court within five business days which states the client's current address and telephone number, as well as the next scheduled hearing date of July 16, 2021, for a settlement conference, and the trial date of August 2, 2021.

Motion to be Relieved as Counsel (Kim Wade)

The motion to be relieved as counsel for plaintiff Kim Wade by Jamil L. White, Esq. and Louis White PC is continued to November 27, 2020, at 8:30 a.m. in Department 3.

The declaration filed in support of this motion references the name of client Allison Morales only. In order to address any potential confusion arising from the declaration, counsel shall file and serve an amended declaration in support of the motion which specifically references client Kim Wade, as well as notice of the continued hearing date, by no later than November 10, 2020.

5. S-CV-0042143 Am. Healthcare Admin. Services, Inc., et al vs. Aizen, Lance

Cross-defendants demur to the second, third, fourth and fifth causes of action alleged in the cross-complaint filed by defendant and cross-complainant Lance Aizen ("Aizen").

A party may demur where the pleading does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). A demurrer tests the legal sufficiency of the pleadings, not the truth of the allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. The allegations in the pleadings are deemed true no matter how improbable they may seem. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.

The demurrer is sustained as to Aizen's second cause of action for breach of the "AHAS Holdings/Controlling Shareholder Agreement", alleged against defendants AHAS Holdings and the "Controlling Shareholders". The cross-complaint alleges that AHAS Holdings and the Controlling Shareholders "agreed to take all such steps as were necessary and required of them to ensure the Agreement was and could be fully performed..." (Cross-complaint, ¶ 92.) The referenced "Agreement" is the separate Termination of Employment Agreement between Aizen and American Healthcare

Administrative Services, Inc. (“AHAS”). The cross-complaint alleges that pursuant to the AHAS Holdings/Controlling Shareholder Agreement, AHAS Holdings and the Controlling Shareholders agreed to:

...tak[e] all such steps as were necessary to ensure that the Paragraph 3 payments to AIZEN were and could be made in a tax-efficient manner and/or as shareholder distributions by, for example, restructuring AHAS to provide for AIZEN’s share ownership in AHAS HOLDINGS; or by taking such other restructuring steps as were necessary to allow AHAS to fully perform its contractual obligations.”

(Id.) In essence Aizen alleges an oral agreement with the individuals controlling AHAS, a corporation, and AHAS Holdings, the parent corporation of AHAS, by which these cross-defendants promised that AHAS would comply with the terms of the Agreement. By these allegations Aizen seeks to avoid the well-settled rule that a contract signed only by a corporation does not bind the directors, officers or shareholders of the corporation absent express language purporting to bind them individually. *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594-595. The purported consideration for cross-defendants’ promises under the AHAS/Controlling Shareholder Agreement does not go beyond the consideration offered with respect to the Agreement. The alleged breaches of the AHAS Holdings/Controlling Shareholder Agreement constitute breaches of the Agreement. (Cross-Complaint, ¶ 96.) The Agreement itself specifically identifies two options required by AHAS to ensure payments under the Agreement would be made as shareholder distributions. (Cross-Complaint, Exh. A, ¶ G.) Aizen’s assertion that AHAS Holdings and the Controlling Shareholders separately agreed to “tak[e] such other restructuring steps as were necessary to allow AHAS to fully perform its contractual obligations” does not establish the existence of a separate enforceable contract. *See Banco do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1015 (oral contract with vague and uncertain terms is not binding).

The demurrer is overruled with respect to Aizen’s third cause of action for inducing breach of contract/interference with contract, alleged against the Controlling Shareholders. The cross-complaint alleges sufficient facts to support the contention that the Controlling Shareholders acted out of self-interest and stood to reap tangible personal benefits from the principal’s breach of contract, thus supporting an exception to the manager’s privilege. *See Huynh v. Vu* (2003) 111 Cal.App.4th 1183, 1198. The demurrer is also overruled with respect to Aizen’s fourth cause of action for breach of fiduciary duty/minority shareholder oppression, which arises in part based on the allegations supporting the third cause of action for interference.

Finally, the demurrer is overruled with respect to Aizen’s fifth cause of action for conversion, as alleged against the Controlling Shareholder Defendants. The cross-complaint alleges that “CONTROLLING SHAREHOLDERS may have transferred, diverted, secreted, and/or otherwise disbursed AHAS and AHAS HOLDINGS’ assets, assets which would have and should have been used to pay AIZEN amounts due to him as shareholder distributions under the Agreement.” (Cross-Complaint, ¶ 121.) The

allegations of the cross-complaint are sufficient to assert Controlling Shareholders' wrongful exercise of dominion over a specific sum of money owed to Aizen under the Agreement. However, the demurrer to the fifth cause of action is sustained as to cross-defendant AHAS Holdings as the cross-complaint contains no allegations supporting AHAS Holdings' wrongful exercise of dominion over the subject funds.

Cross-defendants' alternative motion to strike is denied.

Aizen is granted leave to amend, and shall file and serve any amended cross-complaint on or before November 23, 2020.

6. S-CV-0043249 Jones, Lloyd D. vs. California Forensic Medical Group

The motion for summary judgment is continued to December 11, 2020, to be heard by the Honorable Steven J. Howell. The date, time and department for oral argument will be set forth in the tentative ruling published in advance of the continued hearing date.

7. S-CV-0043589 Achstein, Steven vs. Mercedes-Benz USA, LLC

Plaintiff's motion to compel deposition attendance is granted.

Mercedes-Benz of Rocklin's person most qualified and Eric Triebull (Service Advisor), Michael Dougherty (Service Advisor), Scott Parry (Service Advisor), Rick Craine (Shop Foreman)/technician number 315, technician number 2196, and technician number 2231, shall appear for their depositions on or before November 23, 2020. Counsel shall meet and confer within the next five days regarding the specific date, location and mode of taking the subject depositions.

Plaintiff is awarded sanctions in the amount of \$750 from counsel for defendant.

8. S-CV-0043653 Jordan, Van vs. James, Roy, et al

The parties' requests for judicial notice are granted.

Plaintiff and cross-defendant Van Jordan ("Jordan") demurs to the second amended cross-complaint filed by Roy James and Jeannine James.

A party may demur where the pleading does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). A demurrer tests the legal sufficiency of the pleadings, not the truth of the allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. The allegations in the pleadings are deemed true no matter how improbable the allegations may seem. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604. A demurrer can only be used to challenge defects that appear on the face of the pleading, or from matters that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. No other

extrinsic evidence may be considered. *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.

The demurrer is overruled.

The second amended cross-complaint adequately alleges the existence of a written contract by setting out the terms of the contract verbatim in the pleading, and by attaching the documents allegedly comprising the agreement as exhibits. *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489. The second amended cross-complaint otherwise alleges a cause of action for breach of contract.

The issue of whether Jordan actually authorized his counsel to settle the action pursuant to the terms stated in Exhibit A to the second amended cross-complaint is a matter outside of the pleading that cannot be resolved by the court in ruling on the demurrer. Further, that the proposed Settlement Agreement and Full Release of Claims transmitted by cross-complainants contains additional terms not proposed by Jordan does not bar cross-complainants from alleging that they accepted the terms set forth in Exhibit A to the second amended cross-complaint. Finally, while Jordan accuses cross-complainants of inappropriate redactions to Exhibit A in order to mislead the court and avoid demurrer, he has taken no steps to submit an unredacted version of Exhibit A in support of this claim.

Jordan shall file and serve his answer to the second amended cross-complaint on or before November 23, 2020.

9. S-CV-0044249 Roark, Russell vs. Murphy, Terry

As a preliminary matter, the court notes that due to apparent clerical error, the motion to strike previously filed with the demurrer is currently set for hearing on November 13, 2020. On its own motion, the court advances the hearing on the motion to strike to November 6, 2020.

Demurrer to First Amended Complaint

Defendant's request for judicial notice is granted.

Defendant Terry Murphy ("Murphy") demurs to each cause of action alleged in plaintiff Russell Roark's first amended complaint. A party may demur where the pleading does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). A demurrer tests the legal sufficiency of the pleadings, not the truth of the allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. The allegations are deemed true no matter how improbable they may seem. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.

The demurrer is sustained as to plaintiff's first cause of action for breach of oral contract, fourth cause of action for contract implied in law, fifth cause of action for

partition by sale, and sixth cause of action for accounting. Each of these claims arise from an alleged oral promise by Murphy to place plaintiff on title to certain real property “once the issues regarding Plaintiff’s debts were sorted out.” (FAC, ¶ 12.) An oral agreement for the transfer of an interest in real property is invalid under the statute of frauds. Civ. Code § 1624(a)(3). While an exception to the statute of fraud exists based on part performance, plaintiff must allege facts “which establish a sufficient change in the plaintiffs’ position that the application of the statutory bar would result in an unjust and unconscionable loss.” *Harrison v. Hanson* (1958) 165 Cal.App.2d 370, 376. Payment of money forming consideration for the oral agreement is insufficient by itself. *Id.* Case law suggests that the part performance exception may be invoked where the buyer takes possession of the property, and makes full or partial payment of the purchase price, or makes valuable and substantial improvements on the property in reliance on the oral agreement. *Id.*; see also *Laughton v. McDonald* (1923) 61 Cal.App. 678, 681;

Plaintiff alleges an initial contribution towards purchase of the subject property in the amount of \$41,594.18, plus a subsequent contribution of approximately \$10,000 worth of labor and materials to prepare the property to be rented. (FAC, ¶ 10.) Plaintiff does not allege that he took possession of the property, and the allegations of certain contributions to the down payment, and to improve the property, are insufficient to show a sufficient change in plaintiff’s position such that an unjust and unconscionable loss would result if the statute of frauds was applied.

The demurrer is sustained as to plaintiff’s second cause of action for actual fraud, and third cause of action for constructive fraud. Plaintiff’s actual fraud claims lacks requisite specificity. Plaintiff fails to allege how, when, where and by what means defendant made the alleged representations. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638. With respect to the constructive fraud claim, plaintiff fails to allege nondisclosure or breach of duty, coupled with intent to deceive. *Younan v. Equifax* (1980) 111 Cal.App.3d 498, 516, fn. 14.

Finally, the demurrer is sustained as to plaintiff’s seventh cause of action for conversion. The elements of a conversion claim are (1) plaintiff’s ownership or right to possession of property; (2) defendant’s conversion by wrongful act or disposition of property rights; and (3) damages. *Hodges v. County of Placer* (2019) 41 Cal.App.5th 537, 551. Plaintiff’s conversion claim is based on Murphy’s refusal to retitle the property in both plaintiff and Murphy’s names, and Murphy’s failure to split any rental profits with plaintiff. (FAC, ¶¶ 57-58.)

Conversion cannot apply to Murphy’s refusal to retitle the subject property, as the tort of conversion does not apply to real property. *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1295. As to the rental profits, plaintiff fails to allege ownership or right to possession in light of the court’s finding that the statute of frauds bars plaintiff’s claim of an oral agreement. Further, the claim fails because plaintiff fails to allege a specific, identifiable sum of monies that were allegedly converted. See *Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681.

The court does not agree that the doctrine of unclean hands or the doctrine of laches applies as a matter of law based on the allegations of the first amended complaint. Further, Murphy does not establish that the applicable statute of limitations bars the claims. *See Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42 (running of statute of limitations must appear “clearly and affirmatively” from the face of the complaint).

Plaintiff is granted leave to amend. Any amended complaint shall be filed and served on or before November 23, 2020.

Motion to Strike

In light of the court’s ruling on the demurrer, the motion to strike is dropped as moot.

10. S-CV-0044509 Ellington, Robbie C. Jr vs. Thunder Valley Casino – Resort

Defendant Thunder Valley Casino Resort’s request for judicial notice is granted.

Defendant’s unopposed motion to quash service of summons and complaint is granted.

Defendant seeks to quash service based on the doctrine of tribal sovereign immunity. Pursuant to the 1999 Tribal-State Compact between the United Auburn Indian Community (“UAIC”) and the State of California, the 2004 Amendment to the Compact, and the 2015 Tort Claims Ordinance adopted by the UAIC, this court lacks jurisdiction over claims involving bodily injury, property damage, or personal injury, arising out of operation of the “Gaming Facility”. A challenge to the court’s jurisdiction based on the doctrine of tribal sovereign immunity may be raised by a motion to quash. *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1416-1418. Defendant establishes that this court lacks jurisdiction over the claims alleged by plaintiff in this action. Consequently service of the summons and complaint is quashed.

11. S-CV-0044511 Patelco Credit Union vs. Graves, Simmie Jr., et al

The motion for sanctions is continued to December 18, 2020, at 8:30 a.m. in Department 3, to be heard with the scheduled motion for summary judgment.

12. S-CV-0044635 Helena Agri-Enterprises, LLC vs. Singh, Sumanpreet, et al

Plaintiff’s application for writ of attachment and right to attach order is continued to November 13, 2020, at 8:30 a.m. in Department 3, to be heard with plaintiff’s other pending application.

13. S-CV-0044923 Margherita, Andrew, et al vs. Steinhauff, Michelle

Defendant Michelle Steinhauff aka Michelle Whitten, individually and as personal representative of the Estate of Matthew F. Steinhauff, deceased, moves to set aside her default entered July 16, 2020, pursuant to Code of Civil Procedure section 473(b).

The motion is denied. The motion must be denied as defendant fails to attach a copy of the answer or other pleading proposed to be filed. Code Civ. Proc. § 473(b). Further, defendant does not adequately establish that her failure to timely respond to the complaint was due to inadvertence, surprise, or excusable neglect. *Id.*

14. S-CV-0045167 Artesian Home Products vs. Dumm, Jeffrey, et al

The motion to compel compliance with subpoena is continued to November 20, 2020, at 8:30 a.m. in Department 3.

15. S-CV-0045541 Daniels, Priscilla vs. Mary E. Parker, Trustee

Plaintiff seeks a preliminary injunction to restrain and enjoin defendant and defendant's agents or anyone acting on her behalf from restricting, interfering with, or obstructing plaintiff or persons employed by plaintiff from restoring water access at the well which services both plaintiff and defendant's property.

A preliminary injunction preserves the status quo until a final determination on the merits of the pending action. *Casmalia Resources, Ltd. v. County of Santa Barbara* (1987) 195 Cal.App.3d 827, 832. Prior to issuing a preliminary injunction, the trial court must first determine the likelihood that plaintiff will prevail on the merits of the action. *Dept. of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1560; *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69. Second, the court looks to the interim harm that will occur if the injunction is denied as compared to the harm respondent will likely suffer if the injunction were issued. *Id.* The two factors are interrelated and the court must consider both factors. *Id.*

Plaintiff sufficiently establishes both factors here. The allegations within the complaint along with the evidence submitted in plaintiff's supporting declaration, as well as the declaration of Keith Parker filed in opposition to the application, demonstrate a substantial likelihood that plaintiff will prevail on the merits of her claims for breach of contract and specific performance. Further, plaintiff shows that the interim harm that will occur if the injunction is denied is greater than the harm defendant will likely suffer if the injunction is issued.

The final issue to address is the amount of the undertaking. If a preliminary injunction is granted, the court must require an undertaking or cash deposit. Code Civ. Proc. § 529. Plaintiff is ordered to post a bond with the clerk of the court in the amount of \$500 on or

before November 20, 2020. If the bond is not posted as required, defendant may apply to the court for an order dissolving the injunction.
